



November 30, 2020

The Honorable Jeff Leach  
Chairman, Texas House Committee on Judiciary and Civil Jurisprudence  
P.O. Box 2910,  
Austin, TX 78768

Re: Notice of Formal Request for Information

Dear Chairman Leach:

In response to the Committee on Judiciary and Civil Jurisprudence Request for Information of November 6, 2020, the Associated Builders and Contractors of Texas (ABC), the Texas Construction Association (TCA), and the Associated General Contractors – Texas Building Branch (AGC-TBB) provide the following joint response:

*Interim Charge 1: Monitor the agencies and programs under the Committee's jurisdiction and oversee the implementation of relevant legislation passed by the 86th Legislature. Conduct active oversight of all associated rulemaking and other governmental actions taken to ensure intended legislative outcome of all legislation, including the following:*

- *HB 2899, which specifies that highway construction contractors are not liable for design defects. Investigate whether expansion of those policies to other areas of public/private contracting is in the best interest of the state.*

All but two states in our country have adopted the *Spearin*<sup>1</sup> doctrine. The *Spearin* doctrine states that as between the contractor and the owner, the owner assumes the risk for owner-provided plans and specifications. Stated more clearly, the contractor is entitled to rely on the accuracy and sufficiency of the plans provided to the contractor. Liability for design defects lies with the party that produced or procured the designs. This doctrine is consistent with other liability policies enshrined in our statutes and parallels policies grounded in personal responsibility, and therefore, this concept should be fully adopted in Texas for all types of construction, not just transportation projects.

House Bill 2899 became effective September 1, 2019. To date, there have been no reported claims as a result of this new law. Therefore, there is no increase in litigation associated with the adoption of the *Spearin* doctrine; possibly because it serves to clarify the lines of responsibility instead of reenforcing the illogical notion of allowing liability to be assigned to a non-responsible party (i.e. the contractor who did not produce nor procure the design documents). Additionally, there is no meaningful difference between transportation projects and other types of construction that would serve as rationale to deny expansion of this doctrine to all types of construction.

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<sup>1</sup> *United States vs. Spearin*, 248 U.S. 132 (1918).

The more than 5000 members of the Associated General Contractors, the Associated Builders and Contractors and the Texas Construction Association support the expansion of the protections provided by H.B. 2899 to all types of construction; bringing Texas in line with the vast majority of the country.

Why adopt the *Spearin* doctrine for all construction projects? Without this expansion, contractors are forced to artificially increase their prices to cover the risk of defective plans created by others. This artificial price increase damages the Texas economy and limits justified new construction, renovation, and growth. Without expansion contractors are forced in most instances to practice architectural or engineering services in violation of Texas law. Contractors will continue to bear the risk of liability for which it is difficult to procure insurance, while design professionals have access to insurance products intended to cover liability for defective designs. Additionally, without this expansion, the responsible party who prepared the defective plans or specifications may escape responsibility for their work product. Due to the economic loss rule,<sup>2</sup> the contractor is barred from bringing a claim directly against the architect or engineer, and due to the current state of the law in Texas, the contractor is left with no remedy.<sup>3</sup>

In conclusion, there is no credible argument that contractors should be held responsible for defective plans and specifications created by others. This is why the other 48 states follow *Spearin*. The 86<sup>th</sup> Legislature began the process of correcting Texas law to appropriately assign liability for design defects and the 87<sup>th</sup> Legislature should continue by adopting the *Spearin* doctrine for all types of construction. By doing so, the construction industry and the Texas economy would benefit.

Sincerely,



Will McAdams, President  
Associated Builders & Contractors of Texas



Corbin Van Arsdale, President  
Associated General Contractors – Texas Building Branch



Jennifer Fagan, Vice President  
Texas Construction Association

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<sup>2</sup> LAN/STV v. Martin K. Eby Construction Co., Inc. 435 S.W.3d 234 (Tex. 2014).

<sup>3</sup> El Paso Field Services v. Mastec N.A. 389 S.W.3d 802 (Tex. 2012).